


***TR 2004/11A1 - Addendum - Income tax:
consolidation: the meaning and application of the
single entity rule in Part 3-90 of the Income Tax
Assessment Act 1997***

 This cover sheet is provided for information only. It does not form part of *TR 2004/11A1 - Addendum - Income tax: consolidation: the meaning and application of the single entity rule in Part 3-90 of the Income Tax Assessment Act 1997*

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Addendum

Taxation Ruling

Income tax: consolidation: the meaning and application of the single entity rule in Part 3-90 of the *Income Tax Assessment Act 1997*

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 2004/11 to include an appendix explaining the Commissioner's view of the decision of the Full Federal Court in *Channel Pastoral Holdings Pty Ltd v. Federal Commissioner of Taxation*¹. The appendix provides guidance on how the Commissioner will administer the relevant provisions of Part IVA of the *Income Tax Assessment Act 1936* and Part 3-90 of the *Income Tax Assessment Act 1997* following the decision of the Full Federal Court in that case.

TR 2004/11 is amended as follows:

1. Contents table

Omit Contents table; substitute:

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2. Paragraph 3

Omit the heading; substitute 'The SER principle'.

¹ (2015) 232 FCR 162; [2015] FCAFC 57; 2015 ATC 20-503.

3. Paragraph 14

After '*Income Tax Assessment Act 1936*'; insert '(ITAA 1936)'.

4. Paragraph 15

Omit the heading; substitute '**MEC groups**'.

5. Paragraph 42

After the paragraph insert:

Commissioner of Taxation

22 September 2004

Appendix 1 – Channel Pastoral

! *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

42A. In *Channel Pastoral Holdings Pty Ltd v. Federal Commissioner of Taxation* (2015) FCR 162; [2015] FCAFC 57; 2015 ATC 20-503 the Full Court of the Federal Court of Australia heard a special case stated pursuant to Part 38 of the Federal Court Rules 2011. The special case concerned three questions reserved for the consideration of the Court regarding the interaction of Part IVA of the ITAA 1936 and the provisions relating to consolidated groups in Part 3-90 of the ITAA 1997. Resolving the questions required the Court to reconsider the principles governing the interaction of Part IVA and Part 3-90 as previously determined in *Federal Commissioner of Taxation v. Macquarie Bank Ltd* (2013) 210 FCR 164; [2013] FCAFC 13; 88 ATR 708; 2013 ATC 20-373 (the *Mongoose* case).

42B. The reserved questions considered by the Court can be stated as follows:

Question 1: Whether the Commissioner was not authorised to make a determination under section 177F of the ITAA 1936 to Channel Cattle Co Pty Ltd (CCC) and to give effect to that determination by including an amount in the assessable income of Channel Pastoral Holdings Pty Ltd (CPH)

Question 2: Whether the Commissioner was not authorised to make a determination under section 177F of the ITAA 1936 to CPH and to give effect to that determination by including an amount in the assessable income of CPH

Question 3: Whether the Commissioner was not authorised to make a determination under section 177F of the ITAA 1936 to CCC and to give effect to that determination by including an amount in the assessable income of CCC

42C. A majority of the Court (Allsop CJ and Edmonds and Gordon JJ) ultimately answered reserved questions 1 and 2 'yes', with the consequence that the Commissioner was not authorised, and reserved question 3 'no', with the consequence that the Commissioner was authorised.

ATO view of decision

The administration of Part IVA

42D. The subject matter of the three questions reserved for the consideration of the Court concerned the narrow issue of the interaction of the provisions in Part IVA of the ITAA 1936 and Part 3-90 of the ITAA 1997. Specifically, the issues to be resolved by the Court, having regard to the facts agreed between the parties, were:

- (i) to which entity could a determination under paragraph 177F(1)(a) of the ITAA 1936 be made, and
- (ii) the action required by the Commissioner to 'give effect' to the determination.

42E. The Commissioner will administer the relevant provisions of Part IVA in accordance with the answer given to the third reserved question by the majority. This means that where a tax benefit within the meaning of paragraph 177C(1)(a) of the ITAA 1936 is obtained by an entity in connection with a scheme that includes, as a step, an entity, not being a subsidiary member of a consolidated group, becoming a subsidiary member of a consolidated group, the Commissioner will make a determination for that entity and give effect to that determination by including an amount in its assessable income.

42F. The reasoning of the majority in the *Mongoose* case will not be followed.

The interpretation of the SER

42G. In answering the reserved questions, the primary focus of the joint judgment of Edmonds and Gordon JJ was the interaction of Part IVA of the ITAA 1936 and Part 3-90 of the ITAA 1997 in the particular circumstances under consideration. However, in relation to the ordinary operation of the SER, Edmonds and Gordon JJ stated at paragraph 80 of the joint judgment that:

In the normal course, where a subsidiary member of a consolidated group enters into a scheme to which s 177D applies, the Commissioner is authorised to make a determination under s 177F(1), but the authorised determination will be (in a para (a) case) one to include an amount in the assessable income of the head company, to which for tax assessment purposes the activities of the subsidiary member are, by s 701-1, attributed and subsumed. Effect is then given to that determination by the issue of an assessment including the amount in the assessable income of the head company.

42H. This understanding of the SER informed their Honour's approach to addressing the controversy embedded in the first clause of each of the three reserved questions concerning the identification of the 'relevant taxpayer', and ultimately informed their Honour's answers to those questions (with which Allsop CJ agreed).

42I. The Commissioner considers that the description of the ordinary operation of the SER given in paragraph 80 of the joint judgment is consistent with the view expressed in this Ruling (for example, see paragraph 31).

42J. The Commissioner will continue to administer the SER in accordance with the view expressed in this Ruling. In particular, when determining the interaction of the SER and the other provisions of the Income Tax Assessments Acts, the

Commissioner will adhere to the view expressed in paragraphs 26 to 29 and 40 to 42 of this Ruling that, broadly:

- (i) the relevant hierarchy of the provisions in each case is to be resolved through the application of the ordinary principles of statutory interpretation, and
- (ii) the SER may be modified in certain circumstances as section 701-85 of the ITAA 1997 causes it to be subject to the other provisions of the Act, as expressly or impliedly required.

The minority ‘statutory direction’ approach

42K. The interpretation and consequences of the SER as described at paragraphs 119 to 121 of the judgment of Pagone J are not consistent with the Commissioner’s view of the SER as expressed in this Ruling.

42L. The answers given to the reserved questions by the majority of the Court are based on an understanding that the SER operates in a way consistent with the description given at paragraph 80 of the joint judgment of Edmonds and Gordon JJ. Conversely, Pagone J’s ‘statutory direction’ interpretation of the SER informed His Honour’s answers to the reserved questions (that is, ‘no’ to each) and, as a result, his reasoning in reaching those answers does not form part of the *ratio decidendi* of the majority that is binding authority on the interpretation and application of the SER.

42M. Consequently, the Commissioner will continue to apply the SER, including addressing the interrelationship between Part 3-90 of the ITAA 1997 and the other provisions of the Income Tax Assessment Acts, in accordance with the view expressed in this Ruling.

6. Paragraph 43

Omit the paragraph, heading and the detailed contents list; substitute:

Appendix 2 – Detailed contents list

43. Below is a detailed contents list for this Taxation Ruling:

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7. Signature block and references

Omit the signature block and references; substitute:

References

Previous draft:

TR 2004/D2

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 97/16;
TD 2004/33; TD 2004/34; TD 2004/35

Legislative references:

- TAA 1953
- TAA 1953 Pt IVAAA
- ITAA 1936
- ITAA 1936 Pt IVA
- ITAA 1936 262A
- ITAA 1997
- ITAA 1997 177C(1)
- ITAA 1997 177D
- ITAA 1997 177F
- ITAA 1997 177F(1)
- ITAA 1997 177F(1)(a)
- ITAA 1997 4-15
- ITAA 1997 104-10
- ITAA 1997 Pt 3-90
- ITAA 1997 700-1
- ITAA 1997 701-1
- ITAA 1997 701-1(1)
- ITAA 1997 701-1(2)
- ITAA 1997 701-1(3)

- ITAA 1997 701-85
- ITAA 1997 715-215
- ITAA 1997 715-410
- ITAA 1997 Div 721
- ITAA 1997 Pt 3-95
- Acts Interpretation Act 1901

Case references:

- Channel Pastoral Holdings Pty Ltd v. Federal Commissioner of Taxation (2015) 232 FCR 162; [2015] FCAFC 57; 2015 ATC 20-503
- Federal Commissioner of Taxation v. Macquarie Bank Ltd (2013) 210 FCR 164; [2013] FCAFC 13; 2013 ATC 20-373
- Marshall (Inspector of Taxes) v. Kerr [1993] STC 360
- Cooper Brookes (Wollongong) Pty Ltd v. Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26; (1981) 35 ALR 151; 81 ATC 4292; (1981) 11 ATR 949

Other references:

- Explanatory Memorandum to the New Business Tax System (Consolidation) Bill (No. 1) 2002

ATO references

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This Addendum applies on and from 30 January 2019.

Commissioner of Taxation

30 January 2019

ATO references

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ATOlaw topic: Tax integrity measures ~~ Part IVA ~~ General anti-avoidance rules
Income tax ~~ Consolidation ~~ Single entity rule

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